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AN UNCONSTITUTIONAL MILITIA.

EVERY one knows what is meant by the words "State militia"; they have been used in conjunction since the States were formed. As yet, the term "United States militia" has not become familiar; but the name "national militia" has of late come into such frequent use that it sounds like a very natural combination of words.

What it means is the militia of the several States, organized under one system and controlled by the general Government. If it mean less than this, the term is quite inappropriate.

The Constitution of the United States (Art. I., sec. 8) prescribes that Congress shall have power—

"To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress."

In 1792, Congress attempted to exercise the power above expressed, and the militia law, as it now exists, was then in the main created, and during the ninety years since that time Congress has been further trying to do that which it is empowered to do by this constitutional power—that is, it has tried to organize, to arm, and to discipline the militia, while reserving to the States respectively the appointment of the officers and the authority of training the militia. It has failed; and notwithstanding Presidential messages, militia committees, militia commissions, bills proposed, and Congressional debates, the power to organize, to arm, and to discipline remains unexercised. The reason is not far to seek: Congress has been vested with an empty power. It can no more organize and discipline the militia while the authority to train and to officer is vested in the State, than it can grant a charter to the city of New York on the ground that it is a sea-

port, and that Congress has power to regulate commerce with foreign nations.

Why, then, should names be used that convey incorrect ideas?

Perhaps no better evidence of the truth of the foregoing propositions can be presented than the bill reported to the House of Representatives from the Committee on the Militia, March 1, 1882, concerning which the committee say that the bill embodies the suggestions of the National Guard Association of the United States, and is the "most satisfactory solution of the militia question that has yet been proposed." The article by General Ordway, published in THE NORTH AMERICAN REVIEW, April, 1882, is an advocacy of all the features of that bill. They may be briefly stated to be: *First.* Calling the militia which the State *shall see fit* to organize the "National Guard," and the body of able-bodied male citizens, between eighteen and forty-five years of age, enrolled as the State may see fit, and who are not in the "National Guard," the "reserve militia," or inactive class; the two classes to constitute the whole militia. *Second.* The appropriation of one million dollars annually, which sum shall be divided among the States, in proportion to the organized militia force of the States respectively, on a basis and with the limitation of five hundred men to each Congressional representative. This bonus, it is proposed, shall be given in arms, field-artillery, camp, cavalry, and infantry equipments, ammunition, and service-dress, on the conditions that the organizations of the States shall go into camp five consecutive days in the year, drill once a month, hold annual inspections, practice at rifle ranges which the States shall provide, procure the service-dress, account for all property furnished to them, and follow the regulations to be prescribed by a board of seven officers whom the President shall name; reporting in full as to numbers and military property to the U. S. War Department.

From the foregoing statement, it must appear that the last attempt at *organization* is nothing more than a coaxing measure; and a comparison with the law of 1792 will show that the admission is made in this last bill that the attempt to organize, which was then seriously made, has now been abandoned for a policy of help and succor to the deserving and obedient. Under the old law, the enrollment of citizens is directed to be made by captains, and thereupon the citizens must arm and equip themselves. It is true these provisions are dead letters, but they show an effort which has proven futile, and the proposed substitute for these

laws wisely omits such matters. As now suggested, each State shall be *induced* to organize a militia, and to train it, according to a system prescribed for the regular army, by the promise of its proportion of one million dollars annually, upon the continued performance of the conditions imposed.

The criticism to be urged against bills of this nature is that they proceed upon an erroneous theory of legislation. There can be no doubt that the general Government must provide some system for its own protection—that the subject of weapons and defenses and the whole theme of military engineering must be well entertained by it; but inasmuch as the power to organize the militia, and to train and to control it, is really a matter for State management, no legislation should be had that seeks to place the responsibility upon the general Government to provide uniforms, horse trappings, camp equipage, ammunition, and such outfit for the State militia.

The story of the adoption of that portion of the Constitution quoted above is longer than the limits of this article will permit of recital. It may be told in outline that, in 1787, when the delegates to the Federal Convention met, the subject of the militia was one of the most delicate questions involved in the Constitution which they proposed to draft. Everything relating to the sovereignty of the States was, so far as most of the delegates were concerned (and perhaps it was still more so with their constituencies), to be surrendered with great jealousy. Mr. Mason, from Virginia, one of the ablest delegates present, framed the provision originally giving to Congress power "to make laws for the regulation and discipline of the militia of the several States, reserving to the States the appointment of the officers." This was immediately met by Mr. Ellsworth, of Connecticut, with the objection that this was going too far, and the control of the Government should be limited to the occasions when the Government should call the militia into service, or when the States entirely neglected the militia. Mr. Dickinson, from Delaware, thought the Government should have control of only one-fourth part of the militia at a time, and after some discussion Mr. Mason withdrew his proposed clause, and suggested that the power be "to make laws for regulating and disciplining the militia, not exceeding one-tenth part in any one year." This plan for a "select militia" did not, however, meet with approval, and after various expressions of opinion that the

States would not give up their control over the militia, the subject was referred to the Committee of Eleven, who, some days later, reported the clause as it now stands, with the exception that the words "to provide for organizing," then read "to make laws for organizing."

In debate Mr. King, of Massachusetts, on behalf of the committee, explained that, by "organizing," the committee meant proportioning the officers and men; by "arming," specifying the kind, size, and caliber of arms; and by "disciplining," prescribing the manual, exercise, and evolutions. Later in the debate he further explained that "arming" meant, not only as above stated, but included the authority to regulate the modes of furnishing arms, either by the militia themselves, the State governments, or the national Treasury, and that laws for disciplining must involve penalties. Two resolutions were negative, phrasing the power, respectively, "to establish a uniform and general system of discipline," and "to establish a uniformity of arms, exercise, and organization"; and the proposition of Mr. Madison, that the reservation of the appointment of officers to the State be limited to officers "under the rank of general officers," met with great disapproval. Few appreciate how much opposition from the States arose upon the clause as it was finally adopted; nor was it until after vigorous argument that the final ratifications were made.

The act of 1792, although going as far as the constitutional power appeared to extend, was found to be of very little value within a very short time of its adoption. In December, 1793, President Washington, in his address to Congress, says: "It is an inquiry which cannot be too solemnly pursued, whether the act more effectually to provide for the national defense, by establishing a uniform militia throughout the United States, has organized them so as to produce their full effect." In November, 1794, he says: "The militia laws have exhibited such striking defects as could not have been supplied but by the zeal of our citizens. . . . Every appeal to those laws is attended with a doubt on its success." Congress was disposed to do what it could, and the matter was kept before it. In 1794, Mr. Cobb, from his committee, reported: "Viewing this subject as applied to the Constitution of the United States, and the powers therein expressly reserved to the States, they have their doubts how far Congress can, consistently therewith, make any important alteration or amendment in the present law."

When President Jefferson called the attention of Congress to the subject, in 1802, the committee of the House took the matter up again, but reported in February, 1803, by Mr. Varnum, that, after full investigation of the law of 1792, it is considered that it "embraceth all the objects of a militia institution delegated to Congress." In 1806, the matter of a classification of the militia, in accordance with the suggestion of Jefferson to separate "the more active part from that which is less so," was presented to Congress, in a report which, after a thorough examination of the subject, concludes: "That it is inexpedient to adopt measures for the classification or new organization of the militia." In 1810, the Senate committee to whom President Madison's message regarding the militia was referred, reported that: "All . . . within the power of Congress seems to have been already done, unless it should be deemed expedient to make a new organization, by a classification which shall constitute a select and a reserve militia; . . . and as the committee are unwilling to derive any powers to Congress not expressly given by the Constitution, nor necessarily incident to the powers delegated," they therefore ask to be discharged from further consideration of the subject. Mr. Clay, during the same month (March), reported to the House that it would be improper to innovate on the present system of the militia.

Through successive administrations change in the law, which was inoperative, was repeatedly proposed, but no other plan has ever been adopted. The militia of the States is all the male citizens able to bear arms between eighteen and forty-five years of age, and the defense of the nation lies in that reserve, which is ready to act when called on, and to act intelligently. It is true that a far more liberal view of the powers delegated to Congress may now be taken, with the approbation of a majority of the citizens of the United States, than was taken before the last change of political parties; nevertheless, an express reservation to the States of authority to officer and to train their own militia cannot be overcome, except by a change in the Constitution.

The vital principle of the proposed law is one million dollars; and it is assumed that, taking away all enactments as to the formation of militia organizations, and leaving it to the States to organize their troops, either by volunteer or draft measures as they choose, the latter will be incited to perfect their brigades in order to share in the purse provided. This may be a shrewd

plan, but it seems to be neither proper, so far as the States are concerned, nor politic, so far as the general Government is concerned; and an examination of other details of the bill will further confirm these objections. It is provided that all property issued to the States shall remain the property of the United States, and be annually accounted for, and all loss or damage, except wear incident to the service, shall be made good to the United States. It is provided that regiments, brigades, or divisions may have officers from the regular army assigned to do duty as adjutants, assistant adjutant-generals, or chiefs-of-staff; and that officers from the regular army shall be detailed to attend the inspections of the militia organizations of the States, whenever the inspections of these organizations which share the said annual fund shall take place.

In respect of these provisions, it may be said that to have no authority over the militia, as such, and to hold it accountable for all property issued to it, immediately leads to an anomaly. Since 1808, the general Government has annually appropriated two hundred thousand dollars, which has been applied to the various States, latterly in the proportions of the Congressional representations of those States, and the opinion of the United States Attorney-general, in 1874, was expressed, on application to him by the Chief-of-ordnance, that no power existed to withhold from any State its share of that fund. He held that the State took a qualified interest in the property in the nature of a trust to use it for military purposes, but that he knew of no provisions by which an accounting with the State could be had. There can be no question that Congress has power to give to a State a sum to arm its militia, or a certain proportion of arms, on certain conditions, but in this matter the sum appropriated is for an institution which is primarily for the local protection of the State helped, and the relations of the States to the general Government should be too high for subsequent accountings. In respect of the employment of regular army officers, drawing their pay from the general Government, and taking commissions from governors of States to superintend monthly drills, and five-day encampments once a year, it is believed that the regular army would not be benefited by such assignments, nor would the benefit of such association promote the spirit of general military education among the people.

The regular army of the United States has enough to do, if its

officers do properly what falls within the scope of their military lives. An examination of the reports of the Secretary of War to Congress, made each year, will show the variety of ordnance, engineering, meteorological, and tactical subjects with which that branch of the service is required to deal. For the development of scientific knowledge, as to all the arts of war, the country depends upon the work of the army and navy, and it does not seem proper to take from two to three hundred officers away from that service to do duty as militia officers.

That the general Government should furnish the States with arms as improvements may be devised is quite proper. The manufacture of arms has, since a very early period in the history of our Government, been fostered and controlled by governmental aid. From this source the most effective weapons should be furnished to the States, either by purchase on the part of the State or by gift to the State. The power to arm the militia has been embodied in the Constitution without any restraining clause. Upon such gifts alone the promotion of efficient organizations can be secured. The militia laws can be simplified and perfected to suit the solution which time—as it is said—has made, by providing for such distribution of arms as the States may require for organizations which they may create. Let, however, such other matters as have been alluded to, as well as rifle-matches, which the bill referred to provides for, remain with the States. Why should from twenty-five to thirty thousand dollars be expended yearly, to transport teams and reserves to a contest between representatives of all the States? The money which the general Government shall raise from customs and revenues can be put to better use.

We have an army and a navy, such as it is, and instead of spreading a limited peace income in very thin layers over a very large surface, let our real sources of military and naval knowledge be helped, and let the States, in something of the independent spirit of their histories, take care of their own homes and factories, and give evidence of their ability to respond to any call from the Executive “to execute the laws of the Union, suppress insurrections, and repel invasions.”

CHARLES E. LYDECKER.